(16)

No. 97-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF MONTEREY,

Petitioner,

vs.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. (a) When a citizen sues a local government agency for damages under 42 U.S.C. § 1983, for a violation of federally protected rights, *may* a jury decide whether the government is liable, whatever the substantive constitutional or statutory rights invaded?

(b) May a municipal defendant in a § 1983 action for damages forbid a trial by jury?

2. In light of this Court's decisions in *Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374, 391, fn. 8 (1994), each of which concluded that purported "findings" made by state and local government agencies to support land use regulatory actions must be subjected to searching review to determine the validity of their bases, is it proper for the trier of fact in a regulatory taking case to review the reasonableness of such governmental action?

3. When local government regulates the use of land, must the extent of the regulatory restrictions imposed on the property be in proportion to the harm sought to be prevented?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents Del Monte Dunes at Monterey, Ltd. and Monterey Del Monte Dunes Corporation are affiliated with Borg Warner, a Chicago, Illinois company that has issued shares to the public.

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STATEMENT OF THE CASE

This 42 U.S.C. § 1983 case was filed in U.S. District Court in 1986, when California courts provided no compensatory remedy for regulatory takings. California's erroneous rule of *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) was not overruled by this Court until *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Thus, in 1986, just compensation was available only in federal courts, under federal law.

The District Court initially dismissed the suit as unripe under *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Court of Appeals (Judges Hug, Tang, and Boochever) reversed, holding that, because five different plans had been denied by the City, the dispute was ripe for litigation. (*Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 [9th Cir. 1990] [*Del Monte I*].) On remand, the jury decided in Del Monte's favor on the takings and equal protection claims and the court decided in the City's favor on the due process claim. That result was affirmed (Judges Wallace, Leavy, and Baird). (*Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 [9th Cir. 1996] [*Del Monte II*].) This Court granted certiorari.

The City's factual statement (adopted by its seven *amici curiae* as well) omits virtually all reference to *Del Monte I* and the facts underlying it. Those facts, however, make clear why the jury, the trial Judge, and six appellate Judges all concluded that the City had unlawfully taken Del Monte's property.

The history of this case is accurately summed up in *Del Monte I* (920 F.2d at 1502-1503) (incorporated into the opinion under review here [95 F.3d at 1425]), and reflected in the evidence in the Joint Appendix. *Del Monte I* shows ripeness under *Williamson County*, as well as the intense planning done by Del Monte Dunes and its predecessor, Ponderosa Homes (collectively, Del Monte), in their efforts

to satisfy the City. But after years of effort, it became clear that the City, belying its repeated representations, really wanted to preserve this property undeveloped. (See JA 5, 192-193.)

The property is a 37.6-acre, roughly rectangular parcel of land on the Pacific Ocean coast at the northern end of the City of Monterey. (JA 11.) For many years (dating back to before World War II), it was a Phillips Petroleum Co. terminal and tank farm where large quantities of oil were delivered, stored, and re-shipped. (JA 13.) Thus, the record sometimes refers to it as the Phillips Petroleum parcel. When Phillips ceased using the property, it removed its large oil storage tanks, but left behind pieces of pipe, broken concrete, and oil that had soaked into the sand. (JA 13, 157, 171.) It was, in short, an abandoned industrial site that would need cleaning and restoration before it could be used for anything. (JA 211-212.) No matter how the City and its *amici* seek to cloak it in environmentally attractive descriptions, that remains the undeniable fact.[1]

In addition to the post-industrial debris (and trash that local citizens surreptitiously dumped on the site) (JA 211-212), Phillips Petroleum had left behind non-native ice plant, planted to prevent erosion around its oil tanks. (JA 212.) As ice plant covers the ground, it secretes a substance that forces out other plants (JA 21), including the native buckwheat, the only known habitat for an endangered insect known as Smith's Blue Butterfly (or SBB). There were scattered buckwheat plants on the property but, absent human intervention, the ice plant would wholly displace them. (JA

[1] Giving an environmental slant to the facts has become a favored tactic of pro-regulation advocates these days. See, e.g., Lazarus, *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Env'tl Law 179 (1997), in which counsel for the government in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. __, 137 L.Ed.2d 980 (1997) describes the way he spun the issue away from the constitutional issues at its heart and toward paeans to the beauty of Lake Tahoe.

213-214.) Although buckwheat is the natural habitat of the SBB, no eggs, larvae, or adults of the species were found during extensive searches of this property in 1981, 1982, 1983, and 1984 (JA 16); one SBB larva was found late in 1984 (JA 114); none in 1985 (JA 115). The SBB lives for only one week, travels 200 feet (maximum) and must land on a mature, flowering buckwheat plant in order to survive. (JA 219.) The site is quite isolated from other possible SBB habitats, so that travel to or from this property is unlikely, if not impossible. (JA 218-221.) Ironically, without Del Monte's project (that would remove all ice plant and sow additional buckwheat) the putative SBB habitat was about to be overrun and eliminated by ice plant. (JA 213-214.)

Before 1981, the City zoned the property for multi-family residential use, in keeping with the commercial, industrial, and multi-family residential uses virtually surrounding it — 29 units per acre, or more than 1,000 homes for the entire parcel. (JA 158.)

But the owners didn't ask for 1,000 units. Or anything close. Rather, in 1981, they submitted an application for only a 344-home development. The City's Planning Commission rejected the proposal. But the City went beyond mere denial, saying that a plan with only 7 units per acre, or 264 units, "would be received favorably." (*Del Monte I*, 920 F.2d at 1502.)[2]

So the owners, at considerable expense, redesigned the project accordingly, keeping in constant contact with the City's planners to ensure that their new plan would be appropriate. (JA 159.) In 1983, they submitted their plan for the 264 units the City said it wanted. However, the City

[2] That was in keeping with this Court's belief in *Williamson County* that planners would not merely deny applications, but indicate "how [the property owner] will be allowed to develop its property." (*Williamson County*, 473 U.S. at 190.) Please note that, without any pretense of changing the zoning, the City's planners arbitrarily announced that they wanted a development proposed at 1/4 the density allowed by law.

Planning Commission turned down the application. This time, the planners said that a 224-unit proposal "would be received favorably." (*Del Monte I*, 920 F.2d at 1502.)

The owners then complied with the City's 224-home demand. But when they took that one to City Hall, in early 1984, the same Planning Commission that solicited this proposal said "no." The owners appealed to the City Council, which remanded the matter to the Planning Commission with directions to consider a 190-unit development (*Del Monte I*, 920 F.2d at 1502), representing a further 15% reduction in homes and a corresponding 15% reduction in ground coverage. (JA 164.)

Back the owners went. Another redesign; another resubmittal; another Planning Commission denial; another administrative appeal to the City Council. The City Council again overruled the Planning Commission and approved the 190-unit development, using a plan that showed the size and shape of buildings, roads and open spaces (*Del Monte I*, 920 F.2d at 1502),[3] but with a surprise or two up the municipal sleeve.

The plan ostensibly approved by the City Council for this 37.6 acres had buildings and patios on only 5.1 acres, with another 6.7 acres in public and private streets (including public parking and accessways to the beach). The remainder was to be left open: 17.9 acres in public open space, and another 7.9 acres in landscaped areas. (JA 87.) In other words, contrary to the assertions of the City and its *amici*,

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[3] The City's brief sums up all that work and all those proceedings and its own direct participation in the planning of Del Monte's property with the bland phrase "[g]radually, Ponderosa [Del Monte's predecessor] scaled back its proposal." (City 5.) The City's summary fails to inform this Court of either its own actions or the events that caused a temporary taking *after five projects were turned down*.

This Court has noted the importance of such a "series of official actions" in determining § 1983 liability. (*Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 [1977].)

there were exactions galore in this project. The City insisted that Del Monte "give" it a large portion of the property for use as a public beach (including public access and parking), preserve the sand dunes to hide the homes from passing motorists, and to provide a buffer to separate the homes from the neighboring state beach.[4]

But the City Council's approval knowingly forced development into the "bowl" (or depressed) area in the property's center, that would have to be graded even deeper in order to comply with the City's order that no buildings be visible to motorists on the nearby highway. There were buckwheat plants in the bowl that would thus be destroyed. (JA 180, 184, 251-252.)

Then came the *coup de grace*. The City announced that the very place it had earmarked for the homes was also the *only* place to create a butterfly preserve for the SBB, even though none actually lived on the property. The City believed that if the remnants of the Phillips Petroleum tank farm were removed from the property, and the property cleaned, and the invasive ice plant removed, and the area seeded with buckwheat, then possibly some SBB would

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[4] In the teeth of that record, the American Planning Association brazenly asserts as fact that "[n]o dedication of land or exactions in lieu of dedication were imposed as project conditions by the City of Monterey" (APA, p. 17) and "[t]he City never attempted to coerce Del Monte Dunes into yielding some incident of ownership connected with its land." (APA, p. 18.)

Aside from its evident lack of familiarity with the record, APA's brief needs to be read with more than a grain of salt for a more unfortunate reason: this Court cannot be sure whether to trust APA's representations. APA recently "repudiate[d]" the *amicus* brief it filed here in *Suitum v. Tahoe Reg. Plan. Agency*, 137 L.Ed.2d 980, in a September 16, 1997, letter by its President to the Chairman of the House Judiciary Committee. APA's arguments to this Court in *Suitum* were being used in Congress to support legislation APA opposed. So APA simply disavowed what it solemnly told this Court in *Suitum*. With APA's analysis that transient, caution is warranted.

decide to live there.[5] However, in a classic Catch-22 move, the City refused to permit Del Monte to shift its development to any of the other parts of the property because the City had already earmarked the rest for public use or nonuse or acquisition (i.e., the beach, the dunes, and the State park buffer). (JA 250; R 487.) That left no place on the 37.6 acres on which to build *anything*. (R 203, 486-487.) The wipeout was total. As the Court of Appeals would later summarize it, "the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." (95 F.3d at 1433.)[6]

Del Monte then filed this action because, as in *Lucas*, 505 U.S. 1003, the City's actions had denied it all productive private use. Moreover, as Del Monte quickly learned, it could not sell the property in the open market either. In light of the City's actions, potential buyers disappeared. (JA 254-258.) The State of California then bought the property for less than half of its fair market value, with a non-negotiable, "take it or leave it" offer. (JA 259-260, 264.)[7]

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[5] The City simply ordered it prepared on the if-you-build-it-they-will-come theory of the movie "Field of Dreams." But this isn't Hollywood, it's real life, and this is an abandoned petroleum tank farm. Because of that, as the Solicitor General notes, the U.S. Fish and Wildlife Service commented that even complete elimination of this site would not threaten the survival of the SBB. (U.S. 3, fn. 2.)

[6] That's hardly the " 'simpl[e] limitation on the use' of the property" portrayed by *amicus* League for Coastal Protection (p. 5).

[7] Under California law, when city confiscatory action causes a property owner to sell land at a loss, the owner is entitled "to recover from the City any loss sustained as a result . . . ." (*City of Los Angeles v. Ricards*, 10 Cal.3d 385, 388, 515 P.2d 585 [1973].) This is a generally prevailing rule. (See, e.g., *Argier v. Nevada Power Co.*, 952 P.2d 1390 [Nev. 1998].) Although Del Monte was paid slightly more than it had paid for the property four years earlier, it received nothing for its carrying, planning, and legal costs, and it was stuck with the responsibility for cleaning environmental problems before the State would accept it. (R 518.)

After hearing this evidence, the jury found a temporary taking, as well as denial of equal protection of the laws.[8] It awarded $1.45 million. The District Court would not allow damages for anything else including loss in the value of the property. (95 F.3d at 1425.) The Judge thereafter decided that the City's actions did not violate Del Monte's substantive due process rights (Pet. App. 41), while concluding that that did not conflict with the jury's verdict (Pet. App. 39). The Judge also denied the City's post-trial motions for entry of judgment as a matter of law and for a new trial (95 F.3d at 1425), thus accepting the jury's evaluation of the taking and equal protection issues. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

In *Dolan*, 512 U.S. at 392, this Court admonished:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ."

In the teeth of that explicit pronouncement, the City asserts that Fifth Amendment rights should receive a lesser level of protection than others.

1. This is a civil rights case brought under 42 U.S.C. § 1983, not an "inverse condemnation" case. The City, acting under color of state law, failed in its legal duty to acquire the subject property, and denied Del Monte the Fifth

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[8] The equal protection violation was based on the substantially different treatment given Del Monte when compared to the industrial and high-density residential developments of adjacent properties. The Court of Appeals did not deal with this issue, as the legal ruling was duplicative of the taking issue.

Amendment's protection.[9] All § 1983 plaintiffs are entitled to be treated alike, as all are invoking the same statutory remedial scheme against local government entities and officials who violate federal constitutional or statutory guarantees, regardless of the nature of the violation.

All Circuit Courts have consistently held that § 1983 liability issues are for juries to decide; some have held that liability issues *must* be so decided. Until the City's bald assertion here, no one questioned this practice. This Court's jurisprudence assumes the propriety of jury trials. (See, e.g., *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 [1989]; *Hetzel v. Prince William County*, 523 U.S. __, 140 L.Ed.2d 336 [1998].)

The courts below were correct in ruling that it was not error to submit the liability issue to a jury. Section 1983 authorizes an "action at law," which implies that such actions should be tried to juries, as such actions are understood to mean those in which damages are awarded by juries. Beyond that, the Seventh Amendment authorizes a jury trial in this kind of action, because it protects the right to trial by jury in "suits at common law," another phrase commonly understood to mean suits that were of a type traditionally tried to juries. This Court treats § 1983 suits as "constitutional torts," i.e., suits in which liability turns on wrongful governmental conduct, not the specific federally protected rights that are violated. Tort actions for damages are the kind that would have been tried to a common law jury.

2. Land use decisions of local regulators are not immune from judicial review for constitutionality. That has always been true. (*Nectow v. City of Cambridge*, 277 U.S. 183 [1928].) The City and its *amici* ask this Court to revolutionize the field of land use law by creating some sort of

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[9] The Fifth Amendment right to just compensation was the first item from the Bill of Rights to be selectively incorporated into the Fourteenth Amendment's due process guarantee. (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 [1897].)

regulatory aristocracy whose decisions would be beyond judicial review. Their demand is for nothing less than a rule that no court — neither judge nor jury — can review what they have done and determine whether it is constitutionally permissible.

This Court has repeatedly told government agencies that their bare conclusions are not sufficient to justify regulations that stultify the use of land. (*Nollan*, 483 U.S. at 841, *Lucas*, 505 U.S. at 1031, and *Dolan*, 512 U.S. at 389-391.) As the Court of Appeals put it in *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991):

> "We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property. We read the Supreme Court as requiring us to balance the strength of the public interest against the severity of the private deprivation."

That has always been the law, and the City has offered no legitimate reason why it should even be questioned, much less overturned.

3. It is entirely in keeping with American jurisprudence that land use restrictions be proportional to the detriment the regulators are seeking to prevent. Proportionality is central to our system of law in general, and it permeates the field of land use regulatory takings, as well. As *McDougal* put it, "we believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." (942 F.2d at 676.) In other words, it is perfectly legitimate to ask whether the regulation is proportional to its stated goal, or whether the asserted harm justifies the regulation.

The City and its *amici*, however, insist on compartmentalizing takings law in ways this Court has never done. As

will be shown, this Court's takings decisions have always considered whether the means is proportional to the end. And they have done so whether the regulation required physical dedication of property or regulatory stultification of use.

In any event, the issue is academic. The jury was not instructed to consider proportionality, only reasonableness. (JA 304.) The Court of Appeals affirmed the jury's reasonableness determination and, beyond that, concluded that the City's actions were disproportional to its stated purpose. This was a fact-intensive case, and the City simply doesn't like the outcome. The issues it raises do not warrant reversal.

I.
IN § 1983 CIVIL RIGHTS ACTIONS, JURIES *CAN* DECIDE LIABILITY ISSUES. DEFENDANTS HAVE NO RIGHT TO FORBID TRIAL BY JURY

The City and its *amici* misfocus their analysis on the question of whether a § 1983 *plaintiff* has the *right* to a jury trial. Although Del Monte believes it would be appropriate for this Court to agree with all the Circuit Courts and so hold, it is not necessary to go that far to affirm the decision below. The Court of Appeals held only that "the district court did not err by *allowing* Del Monte's § 1983 action to be tried before a jury" (95 F.3d at 1428; emphasis added) because "it is the type of issue that *can* be put to the jury" (95 F.3d at 1430; emphasis added). The court below did *not* hold, as the City would have it, that all such cases must always be tried by a jury. The issue is *not* whether a jury *must* try this case, but whether it *may*. In order to prevail, the City must demonstrate that it has an absolute right *not* to have a jury decide the case, and that a jury trial in this case therefore constituted prejudicial error *per se*. Neither the City nor any of its numerous *amici* even attempt to make that argument. Nor could they — the law is to the contrary.

> "[T]he right *to* jury trial is a constitutional one, . . . while no similar requirement protects trials by the court . . . ." (*Beacon Theatres v. Westover*, 359 U.S. 500, 510 [1959]; emphasis added; see 9 Wright & Miller, *Federal Practice and Procedure* § 2317 [2d ed. 1995].)

Curiously, the City framed the question properly as "[w]hether . . . 42 U.S.C. § 1983 *requires* that . . . liability issues be determined *by the court* rather than by a jury" (Br. for Pet., p. i; emphasis added), but its briefing is devoted to the converse, i.e., that Del Monte could not compel a jury trial. But, even were the City correct, it would not follow that trial of liability by the jury requires reversal. Any such asserted error had to be harmless because the jury reached the right result on these facts — and the trial court agreed when it denied the City's motion for new trial and motion for judgment as a matter of law. (Pet. App. 4.) The City got the same result from the judge as it did from the jury. It's a case of "no harm, no foul," even on the City's premise.[10]

The correct rule is: *"Where an action at law is erroneously tried in equity, very different questions are raised*

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[10] As noted earlier, the trial judge concluded that the substantive due process issue was a legal one for his determination and he decided there was no such violation. Contrary to the City's view (City 42), however, that decision casts no doubt on the jury's verdict, as the questions were different. The due process issue only questioned whether there was any rational basis for the City's action. As discussed *infra*, p. 38, such a rational basis does not insulate the City from a Fifth Amendment taking challenge. In other § 1983 cases, the courts have experienced no discomfort in permitting juries to decide some issues and courts to decide other, seemingly parallel, issues, regardless of their possibly different outcomes. (E.g., *Kim v. Coppin State College*, 662 F.2d 1055 [4th Cir. 1981] [Title VII employment claims were for the court, § 1983 claims were for the jury]; *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 [1st Cir. 1984] [criminal jury found search reasonable and convicted arrestee; § 1983 jury found it unreasonable and awarded same arrestee damages; both OK].)

upon appeal from those which arise where a suit in equity is erroneously tried at law. In the latter case the court, if satisfied that the proper result was reached, may treat the error as harmless. In the former, it must send the case back for a new trial, because of the constitutional guaranty of trial by jury." (*Great American Ins. Co. v. Johnson*, 27 F.2d 71 [4th Cir. 1928], *cert. denied*, 278 U.S. 629; emphasis added; see also *Hurwitz v. Hurwitz*, 136 F.2d 796, 798-799 [U.S. App. D.C. 1943]; *Turner v. Burlington Northern R. Co.*, 771 F.2d 341, 345, fn. 1 [8th Cir. 1985].)

The City and its *amici* also err in arguing as though this were an "inverse condemnation" case they are apparently used to facing in state courts. It is not. This is a federal *statutory* case brought under 42 U.S.C. § 1983 because the City, acting under color of state law, denied Del Monte rights protected by the Fifth Amendment.

As this Court has repeatedly stressed, a § 1983 case is a "species of tort liability,"[11] specifically, a statutorily created "constitutional tort"[12] that sweeps within its ambit all manner of governmental actions that defy Bill of Rights protections. Properly so. Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407

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[11] *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Wyatt v. Cole*, 504 U.S. 158, 163 (1992); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986); *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *Carey v. Piphus*, 435 U.S. 247, 253 (1978).

[12] *Jefferson v. City of Tarrant*, 522 U.S. __, 139 L.Ed.2d 433, 439 (1997); *Richardson v. McNight*, 521 U.S. __, 138 L.Ed.2d 540, 545, 546 (1997); *McMillian v. Monroe County*, __ U.S. __, 138 L.Ed.2d 1, 7 (1997); *Johnson v. Jones*, 515 U.S. 304, 307 (1995); *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477 (1986); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

U.S. 225, 239 [1972]) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 [1972] [quoting with approval]) "read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (*Monroe v. Pape*, 365 U.S. 167, 187 [1961], overruled in part, to expand government liability, in *Monell*, 436 U.S. 658) so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]). While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. __, 139 L.Ed.2d 471, 477 [1997]), and must be broadly and liberally construed to achieve its goals (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 [1989]; *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 [1979]). "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 [1988]) by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights" (*Mitchum*, 407 U.S. at 243). Simply put, when James Monroe sued Frank Pape, he was not suing for trespass and false arrest; he was suing for a violation of a federal constitutional right that, in that case, happened to implicate acts that were also trespass and battery under state law (see 365 U.S. at 169). The same is true here. Del Monte has sued *not* to vindicate state law (see Cal. Const., Art. I, § 19; Cal. Govt. Code § 7267.6), but to secure statutorily authorized redress for the violation of its federal rights secured by § 1983.

A. Juries Routinely Decide Liability In § 1983 Actions

The City and several of its *amici* apparently fear submitting the reasonableness of municipal land use actions to a

jury, as if trial by jury were some sort of social evil, rather than the bulwark of American liberties. (See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 486 [1935]; *Chauffeurs, Teamsters, etc. v. Terry*, 494 U.S. 558, 565 [1990].)[13] This elitist argument that juries are not competent to evaluate such issues (City 27-36; Municipal Art Society 12-13; National League of Cities 22) is without merit. It is particularly disingenuous in the field of planning and zoning, where so-called "ballot box zoning" (i.e., zoning enacted by citizens by initiative measures) is common. (E.g., *DeVita v. County of Napa*, 9 Cal.4th 763, 889 P.2d 970 [1995]; see *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 [1976].) If the California populace at large is thus deemed competent to make and enact complex land use decisions within the confines of a voting booth, how can it be argued with a straight face that specific members of the California public who are carefully selected, instructed and supervised by a federal judge, somehow lose that ability when seated in a jury box?

Moreover, complex issues are routinely submitted to juries,[14] particularly in § 1983 cases, in which juries have been called on to judge the reasonableness of a broad range

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[13] Juries leaven the proceedings by injecting common sense into the balancing process. (See *United States v. Reynolds*, 397 U.S. 14, 23 [1970] [Douglas and Black, JJ., dissenting].) Additionally, as the California Supreme Court has noted, local government officials and local judges can have an unwholesome closeness. (*Garrett v. Superior Court*, 11 Cal.3d 245, 248, 520 P.2d 968 [1974].) Jurors can buffer that problem.

[14] E.g., *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) (antitrust). Even *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), relied on by the City and its *amici*, *refused* to establish a blanket rule that complex issues must be removed from juries. It only removed a discrete issue *in patent cases*, and *expressly limited its decision to such cases*. (517 U.S. at 383, fn. 9.) Whether removing that issue from juries had a salutary effect on patent law is apparently an open question. (See Fisk, "Confusion Follows '96 Landmark Patent Case," The National Law Journal, p. A1 [June 15, 1998].)

of municipal policies.[15] "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than . . . a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts . . . ." (*County of Alegheny v. Frank Mashuda Co.*, 360 U.S. 185, 192 [1959].) As this Court put it after noting that § 1983 cases can present difficult problems, "judge and jury, doing their respective jobs, will be adequate to the task." (*City of Canton v. Harris*, 489 U.S. 378, 391 [1989].)

This Court had no question about the jury's role in § 1983 cases when it decided *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989):

> ". . . the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before the case is*

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[15] These include city budget policy (*Berkley v. Common Council*, 63 F.3d 295 [4th Cir. 1995] [*en banc*]), county law enforcement policy (*Turner v. Upton County*, 915 F.2d 133 [5th Cir. 1990]), municipal policy governing the use of force during arrests (*Beck v. City of Pittsburgh*, 89 F.3d 966 [3d Cir. 1996], *cert. denied*, 117 S.Ct. 1086 [1997]), county road acquisition policy (*Hammond v. County of Madera*, 859 F.2d 797 [9th Cir. 1988]), municipal employment policy (*Richardson v. Leeds Police Dept.*, 71 F.3d 801 [11th Cir. 1995], city medical care policy (*Simmons v. City of Philadelphia*, 947 F.2d 1042 [3d Cir. 1991]), school district sexual abuse policy (*Gonzalez v. Ysleta Ind. School Dist.*, 996 F.2d 745 [5th Cir. 1993]), the conflict between a police department's chain-of-command policy and a township's sexual harassment policy (*Gares v. Willingboro Twp.*, 90 F.3d 720 [3d Cir. 1996], and even the question whether "extortion of outsiders, businessmen, or developers . . . was 'the way things are done and have been done' in the Town" (*Roma Constr. Co. v. aRusso*, 96 F.3d 566 [1st Cir. 1996]). There has been no limit placed on the variety of local policies whose validity has been submitted to juries for review. Land use decisions and takings law are no more arcane in general, and are a lot less complex in this case than in some of those cited.

> *submitted to the jury*. . . . Once those officials who have the power to make official policy on a particular issue have been identified, *it is for the jury to determine whether their decisions have caused the deprivation of rights at issue*." (*Jett*, 491 U.S. at 737; emphasis added.)

Nor did this Court have any question about the jury's role in *Hetzel v. Prince William County*, 523 U.S. __, 140 L.Ed.2d 336 (1998), where the Seventh Circuit had reduced a jury's award. This Court reversed in order to preserve the § 1983 plaintiff's Seventh Amendment right to a jury trial. (140 L.Ed.2d at 339.)

Indeed, in a host of § 1983 cases reviewed by this Court after a trial on the merits, juries had regularly determined both liability and compensation issues. (See *Hetzel*, 523 U.S. __, 140 L.Ed.2d 336; *Bogan v. Scott-Harris*, 523 U.S. __, 140 L.Ed.2d 79 [1998]; *Board of County Comm'rs v. Brown*, 520 U.S. 397 [1997]; *Jaffee v. Redmond*, 518 U.S. 1 [1996]; *Helling v. McKinney*, 509 U.S. 25 [1993]; *City of Canton v. Harris*, 489 U.S. 378 [1989]; *Blanchard v. Bergeron*, 489 U.S. 87 [1989]; *City of St. Louis v. Praprotnik*, 485 U.S. 112 [1988]; *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 [1986]; *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 [1985]; *City of Oklahoma City v. Tuttle*, 471 U.S. 808 [1985]; *Chardon v. Soto*, 462 U.S. 650 [1983]; *Smith v. Wade*, 461 U.S. 30 [1983].) [16]

[16] As for the argument that the proceedings in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) leading up to this Court's decision had not involved a jury (National League of Cities 24), it bears note that on remand, the constitutional taking case was tried to a jury. At the end of Mrs. Dolan's evidentiary presentation, the city agreed to settle with a combination of compensation and development entitlement. (*Dolan v. City of Tigard*, case no. C 94-1259 CV [Ore. Cir. Ct., Washington County].)

Every Circuit that has considered the issue has concluded that juries may determine municipal liability in a wide variety of § 1983 cases (some have held that they must).[17] Significantly, many of the cases consist of reversals of directed defense verdicts on the ground that the liability decision was for the jury.

Neither the City nor any of its *amici* have been able to point to a single case decided in §1983's 127-year history that denied a plaintiff the right to a jury trial except the one aberrational Eleventh Circuit decision in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996).[18] As the lone exception to an otherwise unbroken phalanx of Circuit Court decisions, *New Port Largo* warrants no more than disapproval. The variety of issues litigated in § 1983 suits is as great as the capacity of municipal employees to violate the constitutional rights of citizens. As the City concedes, the intent of the statute was "to provide remedies as broad as the protections afforded by the constitution." (City 21.) That breadth of coverage is in harmony with this

[17] The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have held that parties to § 1983 actions are entitled to jury trials under either the statute itself or the Seventh Amendment. (*Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30, 32 [1st Cir. 1989]; *Patzig v. O'Neil*, 577 F.2d 841, 848 [3d Cir. 1978]; *Burt v. Abel*, 585 F.2d 613, 616, fn. 7 [4th Cir. 1978]; *Anderson v. Nosser*, 456 F.2d 835, 841 [5th Cir. 1972], *cert. denied*, 409 U.S. 848; *Amburgey v. Cassady*, 507 F.2d 728, 730 [6th Cir. 1974]; *Drone v. Nutto*, 565 F.2d 543, 544 [8th Cir. 1977]; *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1427 [9th Cir. 1996]; *Dolance v. Flynn*, 628 F.2d 1280, 1282 [10th Cir. 1980].) The Second, Seventh and Eleventh Circuits routinely submit such cases to juries. (E.g., *Moore v. Comesanas*, 32 F.3d 670, 673 [2d Cir. 1994]; *Lewis v. O'Grady*, 853 F.2d 1366, 1368 [7th Cir. 1988]; *Richardson v. Leeds Police Dept.*, 71 F.3d 801, 806 [11th Cir. 1995].)

[18] In contrast to the opinion below, *New Port Largo* contains no analysis of the issue. It merely accepted the government's assertion (dealt with at pp. 24-27, *infra*) that inverse and direct condemnation cases are the same. They are not. *New Port Largo* got it wrong.

Court's view that § 1983 "provides a remedy 'against *all forms* of official violation of federally protected rights.' [Citing *Monell*.]" (*Golden State Transit*, 493 U.S. at 106; emphasis added.) And that breadth of remedial coverage encompasses the guarantee of trial by jury.

And yet the City and its *amici* ask this Court to arbitrarily carve out *one subject* of § 1983 litigation in which juries *must not* operate, namely, whether overreaching municipal regulatory action takes property through the subterfuge of "regulating" it into total disutility. And they do so on the self-stultifying ground that *if* the City had acted lawfully and condemned the property in the first place, *then* it would have been entitled to a different trier of fact to try a "liability" issue that wouldn't have existed (because a direct condemnation action concedes liability). The short answer is that it didn't, and therefore it wasn't.

The City's argument becomes disingenuous when it is remembered that one of the specific reasons for adopting § 1983 — indeed, the Fourteenth Amendment itself — was to provide a federal remedy against cities that took property without paying for it.

> "Representative Bingham, for example, in discussing § 1 of the bill [which would become 42 U.S.C. § 1983], explained that he had drafted § 1 of the Fourteenth Amendment with the case of Baron v. Mayor of Baltimore, 7 Pet 243, 8 L Ed 672 (1833), especially in mind. 'In [that] case *the city had taken private property for public use, without compensation* . . ., and there was no redress for the wrong . . . .' Bingham's further remarks clearly indicate his view that *such takings by cities*, as had occurred in Barron, would be redressable under § 1 of the bill. More generally . . ., § 1 of the bill would logically be the vehicle by which Congress provided *redress for takings*, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally *prohibited uncompensated takings*. Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that *compensation for a taking* come from an officer in his individual capacity rather than *from the government unit that had the benefit of the property taken*." (*Monell*, 436 U.S. at 686-687; emphasis added.)

Similarly, it "beggars reason" to believe that the problem of uncompensated takings by cities, although one of the explicit bases for both the Fourteenth Amendment and § 1983, would be the *only* type of constitutional violation that would be insulated from jury review — or, indeed, *any* judicial review under the City's overreaching theory.

The City's attempt to differentiate the protection afforded by § 1983 on the basis of the right invaded was rejected a quarter-century ago:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 [1972].)

B. Both § 1983 and the Seventh Amendment Entitled Del Monte to a Jury Trial

In determining whether a party has the right to a jury, the issue is first examined under the statute. (*Lorillard v. Pons*, 434 U.S. 575, 577 [1978].) Here, both the statute and the Seventh Amendment call for a jury trial.

1. Section 1983 Mandates a Jury Trial in Actions For Damages

Section 1983 gives the injured party a broad range of remedies, by making the violator liable ". . . in an action at law, suit in equity, or other proper proceeding for redress." The choice of remedies is the plaintiff's; the complaint determines the kind of action. (*Bell v. Hood*, 327 U.S. 678, 681 [1946].) Here, Del Monte filed an action at law, seeking compensation for the damage inflicted by the City's unconstitutional actions. The right to a trial by jury follows.

"[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law." (*Pernell v. Southall Realty*, 416 U.S. 363, 370 [1974]; see *Feltner v. Columbia Pictures Tel.*, 140 L.Ed.2d 438, 448 [1998] ["We have recognized the 'general rule' that monetary relief is legal."]) Where Congress statutorily creates an action and provides a remedy traditionally enforced at law, then the trial is by jury. (*Pernell*, 416 U.S. at 375; *Curtis v. Loether*, 415 U.S. 189, 195 [1974].) When words are used that have a well-known meaning, Congress is presumed to have used the words in that sense. (*Standard Oil Co. v. United States*, 221 U.S. 1, 59 [1911].) The words "action at law" have always had a clearly understood meaning that involves the right to a jury trial. (See *Lorillard*, 434 U.S. at 583.) A Congressional authorization of an "action at law" authorizes a jury trial. By using a legal term of art like "action at law," Congress allowed this Court to infer a jury trial. (434 U.S. at 583.) Compare *Feltner*, 140 L.Ed.2d at 448, where, lacking any such terms of art in another statute, this Court was not able to infer the statutory right to a jury trial.

2. The Seventh Amendment Mandates a Jury Trial in Actions at Law

In determining whether the Seventh Amendment guarantees a right to a jury in a statutory cause of action, this Court uses a two-part test: first, compare the statutory action to actions in 18th-century England, and second, determine whether the remedy is legal or equitable. (*Tull v. United States*, 481 U.S. 412, 417-418 [1987]; *Granfinanciera v. Nordberg*, 492 U.S. 33, 42 [1989]; see *Markman* 517 U.S. at 376.)

The remedy sought trumps the precise analog to old English forms of action. (*Tull*, 481 U.S. at 421; *Granfinanciera*, 492 U.S. at 42; *Curtis*, 415 U.S. at 196; *Chauffeurs*, 494 U.S. at 565; *Wooddell v. Electrical Workers*, 502 U.S. 93, 97 [1991].)

> "Whether or not a close equivalent to [the statute] existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and *remedies of the sort traditionally enforced in an action at law*, rather than in an action in equity or admiralty." (*Pernell*, 416 U.S. at 375, emphasis added; see also *Curtis*, 415 U.S. at 193; *Tull*, 481 U.S. at 420; *Granfinanciera*, 492 U.S. at 42.)

The Seventh Amendment's reference to jury trials in "suits at common law" extended "beyond the common law forms of action recognized at that time." (*Curtis*, 415 U.S. at 193.) The phrase "suits at common law" was intended to do no more than to distinguish suits traditionally tried to juries from those tried in admiralty or equity. (*Parsons v. Bedford*, 3 Pet. 433, 446 [1830].) The Seventh Amendment right to a jury trial applies to "all but" those cases involving solely equitable remedies. (*Granfinanciera*, 492 U.S. at 43-44; see *Chauffeurs*, 494 U.S. at 564.) When "legal" issues are presented, a jury is mandated upon request. (*Dairy Queen v. Wood*, 369 U.S. 469, 472-473 [1962].)

Applying this Court's two-factor test to this case, it is clear that this case is an action at law, and the closest common law analogs would have been tried to juries.

a. The Closest Common Law Analogs to This Case Are Tort Cases Tried to Juries, Not Equitable Actions Seeking Specific Relief

When seeking analogs to common law causes of action, one must focus on cases involving wrongful, rather than lawful, acts. Here, the City took property without paying for it. That is not proper conduct and should not be treated as if it were municipal business as usual.[19] Thus, for example, when this Court analyzed *Monroe v. Pape*, it viewed police actions as illegal, rather than proper. ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." [365 U.S. at 184; quoting with approval.])

The City and its *amici* simply ignore that fundamental concept. Their simplistic, and legally erroneous, conclusion is that this is an "inverse condemnation" case. Hence, goes the argument, it is like direct "condemnation" because both spring from the substantive provisions of the Fifth Amendment and both labels contain the word "condemnation." The City's approach boils down to this syllogism:

- condemnation cases don't require juries (*Bauman v. Ross*, 167 U.S. 548 [1897]; *Reynolds*, 397 U.S. 14);

[19] The City and its *amici* appear to disagree (City 25), but their words betray the true situation. As the brief of 87 cities and counties puts it, ". . . the taking is not considered a wrong or an injury *as long as the government pays compensation*." (Brief of San Francisco *et al.* 13; emphasis added.) The truth is in the italics: here, the City did *not* pay and still resists paying. *That* makes its actions concededly wrongful.

- an inverse condemnation case is like a condemnation case;
- therefore, inverse condemnation cases don't require juries.

The syllogism is fallacious. For multiple reasons.[20]

First, § 1983 comes into play here *not* because the City is condemning the subject property, but because the City *refused* to condemn it, but took it anyway. This is no more an "inverse condemnation" case than *Owen v. City of Independence*, 445 U.S. 622 was a civil service personnel action, or a "wrongful termination" case. Prosecution under § 1983 determines the character of the litigation. See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) which dealt with a mother's right to custody of her children. *Lawful* proceedings to terminate parental rights are universally held in non-jury, family court, settings. Yet when done wrongfully, and the matter is brought to court via § 1983, the issue becomes one of constitutional tort for the jury, not a

[20] The argument in the text assumes *arguendo* that juries are not constitutionally required in federal direct condemnation cases, as that issue is beyond those presented here for review. When the occasion presents itself, however, there are good reasons to reconsider the accepted bromide that juries are not required. Key among them is an apparent misconception about English practice in the 18th century. From 1708 through 1798, condemnation cases — including both valuation and any other challenges to the taking — were tried to juries on demand. (*deKeyser's Royal Hotel v. The King*, 2 Ch. 222 [1919].) Indeed, "[u]ntil 1854, trial by jury was the only form of trial used in any court of common law." (Sir Patrick Devlin, *Trial By Jury* 130 [Stevens & Sons. Ltd. 1956].) A fuller explication may be found in the *amicus* brief of Pacific Legal Foundation herein, and an exhaustive analysis of both English and early American practices is in Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U.L. Rev. 144 (1996). Nor does this analysis affect takings cases against the United States, as those cases are bound up with the concept of waiver of sovereign immunity (see *McElrath v. United States*, 102 U.S. 426 440 [1880]), something not involved here.

proper family court matter. "These causes of action . . . exist independent of any other legal or administrative relief that may be available as a matter of federal or state law." (*Felder*, 487 U.S. at 148; quoting with approval.)

Second, even if one were to assume this case to be an inverse condemnation case rather than a constitutional tort case, inverse condemnation and direct condemnation are not the same. This Court spoke to this point in *United States v. Clarke*, 445 U.S. 253 (1980). There, the Court had to decide whether a statute authorizing a state to "condemn" land allotted to native Americans also authorized the "inverse," i.e., the seizure of such land by a state, forcing the owner to recover compensation through an inverse condemnation action. This Court made it clear that inverse condemnation is not direct condemnation.

> "There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding .... [and there is a] well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation." (445 U.S. at 255-256.)
>
> "[T]here are sufficient legal and practical differences between 'condemnation' and 'inverse condemnation' to convince us that when § 357 authorizes the condemnation of lands . . ., the term 'condemned' refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority." (445 U.S. at 258.)[21]

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[21] Thus, when the *amicus* brief of the 87 California cities and counties asserts that "[i]nverse condemnation differs from direct condemnation . . . *only* insofar as the action is initiated by the property owner" (p. 6; emphasis added), it argues from a flawed premise. The Court also receives little assistance from the brief filed by 29 states and Guam which, in direct contradiction of this Court's

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Some of those "differences" were noted in *Clarke*. First, condemnation law requires the government to observe many procedural safeguards; a seizure of property fails to fit that mold.[22] As this Court put it with understatement, "[s]uch a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." (445 U.S. at 257.)[23] That shift is important — indeed, sometimes it is critical.[24] It can put the property owner at a "significant disadvantage." (445 U.S. at 258.) While the only issue in virtually all *direct* condemnation cases is the amount of compensation,[25] an *inverse*

(fn. continued)
analysis in *Clarke*, asserts that "[w]ith respect to proofs and issues, state inverse condemnation cases are *generally the same* as traditional eminent domain proceedings." (p. 8; emphasis added.) Both *Clarke* and litigational reality show that they are nothing of the sort.

[22] At a minimum, there are the procedures in Rule 71A, Fed. R. Civ. P., and its state equivalents. There are also the rules adopted by Congress to ensure fair treatment of property owners when government acquires their property (42 U.S.C. § 4651) which have been adopted in all of the states as well (e.g., Cal. Govt. Code § 7267 *et seq.*) and "govern, to some extent" the manner in which government acquires title to property. (*Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5-6 [1984].) Obviously, in a case like this, the government evades these statutory duties and safeguards and commits a constitutional wrong that is subject to redress under § 1983. (See *Lake Country Estates*, 440 U.S. 391.)

[23] Earlier, this Court described the shift as "putting on the owner the onus of determining" the fact, nature and timing of the taking. (*United States v. Dickinson*, 331 U.S. 745, 748 [1947].) Whether "onus" or "burden," it's oppressive, and falls leagues short of the governmental concession of liability that is axiomatic in a direct condemnation action.

[24] See *Agins v. City of Tiburon*, 447 U.S. 255, 258, fn. 2 (1980), noting that this is the principal distinguishing feature between direct and inverse condemnation.

[25] In rare cases, property owners challenge the government's right to condemn. These challenges are rarely successful. (See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 [1984].) And they

(continued)

condemnation plaintiff cannot address that issue until the trier of fact first concludes that an uncompensated taking has occurred.[26] In this context, that difference is crucial.

Congress agrees. For example, attorney's fees are not recoverable in direct condemnation actions under Rule 71A, but they are authorized in successful inverse condemnation cases (42 U.S.C. § 4654), because the government forced onto the property owner the extra burden and expense of proving liability. (*Pete v. United States*, 569 F.2d 565, 568 [Ct. Cl. 1978].) When the government forces a landowner to sue, it violates not only the Constitution, but also statutory provisions. It cannot very well demand that its wrongdoing be rewarded by the courts treating it as if its acts were lawful when, in fact, they give rise to a constitutional tort that encompasses all compensable harms, of which the uncompensated taking is but one.[27]

(fn. continued)
don't deal with liability for the taking (contrary to the assertion of the League of Cities' brief, pp. 11-12), but with the government's right to proceed with the acquisition. That's not a question of liability, but of power and jurisdiction. Liability (i.e., the obligation to pay) is conceded in a condemnation action.

[26] Here is another false premise of the 87 California cities and counties. Their brief says "[i]t would be incongruous to require liability issues in direct condemnation to be tried by a judge, and simultaneously allow liability for inverse condemnation to be tried to a jury." (p. 14.) But by filing a direct condemnation complaint, the government admits "liability" to pay for the property it is taking. Such complaints typically pray that compensation be awarded to the property owner and title be transferred to the condemnor. An exemplar of the prayer in such a complaint appears at 7 Nichols on *Eminent Domain* § 2.11[2], p. 2-49 (3d ed. 1998). For a California form with which the 87 cities and counties ought to be familiar, see 1 *Condemnation Practice in California* § 8.2 at 310 (Cal. Cont. Ed. Bar, 2d ed. 1998).

[27] Thus, in a § 1983 action for an unlawful taking of private property, compensation is awarded not only for the taking but for other tortious harms inflicted in the process. (*McCulloch v. Glasgow*, 620 F.2d 47 [5th Cir. 1980].)

The short of it is this: if the City wanted the benefits of direct condemnation procedure, then it should have condemned this property in the state courts (see Cal. Govt. Code §7267.6), rather than making Del Monte and Ponderosa Homes jump through bureaucratic hoops, going through five different plans in five years, and then tell them that no use could be made of this land. The City was statutorily obligated to initiate a condemnation action. It didn't. It is *not* here as some sort of virtual condemnation plaintiff, but as a constitutional tortfeasor/defendant. The City put its liability in issue by its deliberate conduct. It is in no position to complain because this issue was resolved by a jury — the same as in all other "constitutional tort" cases.

If there is a common law analog to unlawfully taking property without payment, it would be trespass or conversion, as the Court of Appeals held below. (95 F.3d at 1427.) The facts show a deliberate, persistent municipal course of conduct to deny Del Monte all economically productive use, and force the transfer of its land to governmental ownership. The City's plan succeeded.[28] Additionally, as an action whose gravamen is that the City has taken property without

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[28] The property is now owned by the State of California. After the City got done with it, there was no private use for the property and no market for it, except a conveyance to the State at a fraction of its fair market value. Presumably, the property will become part of the adjacent State beach.

One must be careful in predicting governmental action, however. This Court may remember, for example, that in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), South Carolina argued strenuously that Mr. Lucas must leave his property vacant to protect various public interests. After this Court remanded the case to the South Carolina courts, the government settled the case and bought the property. Did it remain vacant? No. The government sold it to another private individual for development so it could recoup its purchase price. (See Kanner, *Not with a Bang, but a Giggle: The Settlement of the Lucas Case*, in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 15 [Callies, ed., ABA Press 1996.])

paying for it, the action is analogous to actions to recover land. Nearly a quarter-century ago, this Court noted that it had "long assumed that actions to recover land . . . are actions at law triable to a jury." (*Pernell v. Southall Realty*, 416 U.S. 363, 370 [1974].) After a thorough review, that assumption was confirmed. (416 U.S. at 376.) Here, the jury found (and the trial judge and appellate panel confirmed) that, by regulating it into total disutility, the City had temporarily taken Del Monte's property as surely as if it had seized it and built a fence around it. As Professor Tribe put it, ". . . forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it' — is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." (Tribe, *American Constitutional Law* § 9-3 at 593 [2d ed. 1988].)

Moreover, the determination of liability is "essential to preserve the right to a jury's resolution of the ultimate dispute." (*Markman*, 517 U.S. at 377.) Liability is the *sine qua non* of this dispute. If a jury is not permitted to determine whether the City's actions took property in violation of the Fifth Amendment's guarantee, then it has effectively been removed from the core of the case. Liability *is* the case. That's the key difference between direct and inverse condemnation.

In short, it is the *violation*, not the nature of the violated right or of the constitutional provision, that is the essence of the § 1983 action. And where the violation is subject to redress by a monetary award, it is an action at law, historically triable to a jury.

b. The Remedy Sought Here is Compensation, a Traditional Legal Remedy Granted by Juries

Although it seems clear that the closest common law analogs to this case would have been tried to juries, there is, as this Court put it, no need to "rest our conclusion on . . . an

'abstruse historical' search for the nearest 18th-century analog. . . . [C]haracterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." (*Tull*, 481 U.S. at 421; citations omitted.) The test is the nature of the remedy, whether equitable or legal.[29] And the general rule is clear: ". . . where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law." (*Pernell*, 416 U.S. at 370; see *Feltner*, 140 L.Ed.2d at 448 ["We have recognized the 'general rule' that monetary relief is legal."]) Where Congress statutorily creates an action and provides a remedy traditionally enforced at law, then the trial is by jury. (*Pernell*, 416 U.S. at 375; *Curtis*, 415 U.S. at 195.)[30]

Chauffeurs, 494 U.S. at 570-571, describes two factors that could, on rare occasion, make payment of money an equitable, rather than a legal, remedy: restitution or an award that is incidental to or intertwined with injunctive relief. In *Chauffeurs*, the damages consisted of back pay and benefits. That was not restitution. (494 U.S. at 571.) Here, the damages consist of compensation for a temporary taking.

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[29] In *Chauffeurs*, for example, the Court concluded that a union's breach of the duty of fair representation more closely resembled an equitable action for breach of trust than a legal action for attorney malpractice, although both were close. Nonetheless, because the remedy sought was purely legal (monetary recovery), a jury was required. (494 U.S. at 566-570.)

[30] The National League of Cities urges (p. 16) that the appropriate remedial analog is injunction, because the purpose of an inverse condemnation action is to compel the government either to condemn the property or rescind the regulation. Wrong. The purpose is to obtain compensation for property *that has already been taken*, as this Court held in *First English*. (482 U.S. at 315.) As for compelling the government to condemn, *First English* is directly to the contrary, denying the courts the power to compel such action (482 U.S. at 321), which is legislative in nature (*Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 [1923]).

That's not restitution either. Injunctive relief wasn't present in *Chauffeurs*, and it isn't present here. This case presents no reason to depart from well-settled law that views a monetary recovery as one at law — traditionally a province of juries.

Noting that the statute authorizes relief via "an action at law, a suit in equity or other proper proceeding," the City ignores Del Monte's complaint seeking the legal remedy of damages, and presses the *non sequitur* that the statute somehow allows a jury only in "appropriate cases," of which, assertedly, this is not one. (City 20.)[31] Aside from ignoring the plain text of the statute which provides for a broad range of remedies *at the victim's election*, this argument ignores basic doctrine under which the plaintiff "is master to decide what law he will rely upon" and, consequently, what kind of case he or she will file. (*Bell*, 327 U.S. at 681.) See also *Tull*, 481 U.S. at 425, in which this Court told the United States that if it wanted equitable procedures, it should have filed a pleading seeking equitable relief. No reason appears why the City should get to occupy a litigational position more favorable than the federal government.

The short answer to these arguments is contained in *Lorillard*, where this Court analyzed a statute authorizing the trial court to grant "legal or equitable relief . . . ." (29 U.S.C. § 626[c].) Because that plaintiff *sought* legal relief, and because Congress had to have known the import of the language it chose, this Court held that the plaintiff was entitled to a jury trial. The same is true here.

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[31] Two of the City's *amici* carry the argument to an extreme, if not a *reductio ad absurdum*, in suggesting that cases involving property rights must be automatically transformed into "other proper proceedings" (which they insist are proceedings not permitting juries at all) no matter what the facts, or how the plaintiff pleads the case. (Municipal Art Society 5, fn. 2; National League of Cities, *et al.*, 7.) No legal or historical basis is provided for this extremist argument.

C. The Issues in This Case Are Appropriate For Jury Determination

The jury in this case was carefully instructed (JA 300-305) to apply this Court's *Agins* takings formula:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." (447 U.S. at 260; citations omitted.)

These two issues are the kind juries have considered in § 1983 cases for generations. As briefed above (p. 15, *supra*), § 1983 juries have examined city budget policy, city and county law enforcement policy, county road acquisition policy, municipal employment policy, city medical care policy, school district sexual abuse policy, and the conflict between a police department's chain-of-command policy and a township's sexual harassment policy, among others.

There is nothing about the *Agins* issues that is more complex or arcane than any of those. (See *County of Allegheny*, 360 U.S. at 192.) Quite the contrary. As this Court has repeatedly said, the determination of whether regulatory action effects a taking of private property is the kind of decision that juries routinely make — an "essentially ad hoc, factual" one. (*Lucas*, 505 U.S. at 1015; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) This Court lays down the guiding policy factors (438 U.S. at 124), the trial court instructs the jury on the standards to apply,[32] and then it is for the jury to decide whether specific

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[32] The City's plaint that seemingly direct factual issues are confused by judicial gloss (thus rendering the factual issues unfit for juries) overlooks that the function of jury instructions is to explain that gloss to the jury so it can proceed accordingly. That is done in every jury trial, and that's what happened below. (See JA 300-305.) The jury was given every instruction the City sought. (Compare *Smith*, 461 U.S. at 50-51.)

municipal acts adhere to or violate the standards.

The first of the two *Agins* inquiries is whether the regulation substantially advances a legitimate state interest. The jury was instructed to find that the City passed this test if there was a reasonable relationship between the City's action and a legitimate public purpose. (JA 304.)[33] "Reasonable relationships" are the meat and potatoes of juries; they examine and decide them in ordinary tort actions every day. It is also the kind of issue § 1983 juries routinely decide. For example, in *Hemphill v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993), the court held that whether prisoner searches are reasonably related to legitimate penological goals was a question for the jury. So, too, in *Parks v. Watson*, 716 F.2d 646, 654, fn. 1 (9th Cir. 1983), a land use case, it was a question for the jury whether the city's policy requiring dedication of geothermal wells was a reasonable precondition to a municipal street vacation.

Here, the jury heard extensive evidence about the City's actions and the reasons offered for them. The jury also knew the entire history of the owners' efforts to build on this property, including each of the five proposals first encouraged and then rejected by the City.

The same is true of the second *Agins* prong, i.e., whether the City's actions denied Del Monte economically viable use of its land. All that was needed to evaluate that issue was a pair of ears and common sense. Diminution and destruction of value are routinely tried to juries in private commercial disputes and direct condemnation cases. The testimony clearly established that, even to consider a 190-unit development on this 37.6 acre parcel (which the City had theoretically zoned for more than 1,000 units), the City demanded a

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[33] The jury was further instructed at the City's request that "legitimate public interest can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development." (JA 304.)

large public beach, a buffer to protect the adjacent State beach, and a dune "viewshed" so that drivers on Highway 1 wouldn't be able to see that there were homes on this property. When the City thereafter said that what was left of the property would have to be left completely undeveloped (but cleaned up and restored to a state of nature) as a preserve for unseen butterflies, the last nail was placed in the coffin of any possible private use for this land.[34] That's not rocket science. And it is elitist arrogance for the City and its friends to suggest that juries are unable to evaluate such evidence.

II.
THE REASONABLENESS AND LEGITIMACY OF GOVERNMENT REGULATIONS HAVE ALWAYS BEEN SUBJECT TO JUDICIAL REVIEW FOR UNCONSTITUTIONALITY

The City and its *amici* have laid bare their fondest fantasy: to regulate land use free from the constraints of the Constitution, and thereafter to be immune from any judicial review, which they see as "second-guessing" them.[35] The

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[34] It is insufferable on this record for the City to assert repeatedly that the property is *still* zoned for intensive residential use if only someone would apply for it. (City 9-10, 18.) In fact, the property is now owned by the State. Moreover, the one thing that the five administrative proceedings made clear is that the "existing zoning" is a sham, and uses permitted by it theoretically will not be permitted in fact. One of the key purposes of § 1983 is "to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice." (*Monroe*, 365 U.S. at 174.) Plainly, this zoning is (at most) only "adequate in theory." Experience showed that it was worthless in practice.

[35] Their position brings to mind the comments of a prominent land use professor following his return from China in the days when it was even more in the grip of a totalitarian regime: "*China is a planners' paradise.* There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. *Once a plan is made, it is the law of the*

(continued)

position would be beneath comment were it not presented by so many coordinated voices in solemn proceedings of this Court. But this orchestrated chorus is nothing less than an attack on the bedrock judicial prerogative of reviewing governmental action for constitutionality. It is not substantiated anywhere in this country's traditions or in the law — nor should it be.[36]

Is there a place for judicial deference to local government? Certainly. For example, when cities condemn land, their determinations of public use and necessity are entitled to deference. (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241-242 [1984].)[37] When legislating broadly, their determinations are entitled to deference (*City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 [1926]), but specific applications of the zoning power have always been subject to judicial review (*Nectow v. City of Cambridge*, 277 U.S. 183 [1928]).

In short, there are limits to deference. "The greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power."

(fn. continued)
land, and as all significant development is public, *what the government plans, it simply does*." (Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 Urban Lawyer 781, 845 [1982]; emphasis added.) That's how it goes *without* constitutional protection.

36 "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review." (*Winger v. Aires*, 89 A.2d 521, 522 [Pa. 1952].)

37 However, those City *amici* who insist on using direct condemnation cases to rationalize deference in regulatory takings (e.g., APA, p. 11) are wide of the mark. In direct condemnation cases the taking is conceded, and the landowner's rights are observed when just compensation is awarded. (*Berman v. Parker*, 348 U.S. 26, 36 [1954].) Here, the taking was denied, and compensation was vigorously contested (nothing has yet been paid).

(*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922]; emphasis added.)

The City's problem is that it refuses to recognize such limits; it demands unreviewable deference to its individualized acts that regulate particular parcels of property into total disutility. That is the situation at bench. Each time Del Monte went to the City with a proposal, the City demanded more but said it would approve less. By the time of the ***fifth*** plan denial, the City demanded everything and approved nothing. With respect, that wasn't planning; that was an unabashed municipal grab that went beyond the mere "extortion" criticized by this Court in *Nollan*. (483 U.S. at 837.)[38] In reviewing land use regulations, this Court has repeatedly made clear that land use planners and regulators are not an aristocracy.[39] They *are* subject to constitutional limitations, and their acts *are* subject to judicial review.[40]

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court ended years of debate and confusion in the lower courts when it reaffirmed that the remedy for a regulatory taking was just compensation. The defendant county and its many *amici* had

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38 Dissenting from a recent California Supreme Court decision, Justice Janice Rogers Brown aptly captured the municipal conduct present here as well: "When the answer to every question about what the public needs or wants or should have is always 'more,' the demand for free public goods is infinite. Against this relentless siphon, the takings clause, and the courts' ardent defense of it, stands as a last lonely bulwark of property rights." (*Landgate v. California Coastal Commn.*, 17 Cal.4th 1006, 1043, 953 P.2d 1188 [1998] [Brown, J., dissenting], *pet. for cert. anticipated.)*

39 As Justice Brennan aptly put it: "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 [1981] [Brennan, J., dissenting on behalf of four Justices].)

40 See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L. Rev. 15, 99 [1983].)

voiced fears that any rule requiring adherence to the Just Compensation Clause in the regulatory context would cripple municipalities' ability to govern.[41] This Court's rejection of those hyperbolic pleas was clear and instructive:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.[42] As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' [Citation.]" (482 U.S. at 321.)

Perhaps underlying that conclusion was this Court's repeated recognition that, when the governmental interest is financial (as in obtaining open space use of Del Monte's property for free or a fraction of its worth), its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A

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41 This jeremiad, which has become standard governmental fare any time anyone suggests that courts exercise constitutional control over their regulatory actions, is repeated at bench. (See APA 5, 21; U.S. 15; 87 Cities and Counties 4, 24.) It wasn't valid in the past. It still isn't.

42 Thus, the Solicitor General's search for a "justification in Fifth Amendment jurisprudence for imposing such a limitation on the flexibility of local governments" (U.S. 15) finds its answer in *First English*.

governmental entity can always find a use for extra money . . . ."]; *United States v. Winstar Corp.*, 518 U.S. 839, 135 L.Ed.2d 964, 1005 [1996] [". . . statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding."].)[43]

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) Particular care is needed when government conditions approval of a project on an actual conveyance of property ". . . since in that context there is heightened risk that the purpose is avoidance of the compensation requirement . . . ." (483 U.S. at 841.)[44]

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) is instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, fn. 10), this Court stressed that what is important is *not* the voiced legislative rationale (because that would always justify the governmental act unless the

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43 In this context, it seems appropriate to note that Professor James Buchanan received the Nobel Prize in Economics for demonstrating that, for all the familiar platitudes about public interest, government officials act in pursuit of their own self-interest, the same as private parties. (See Buchanan & Tullock, *The Calculus of Consent* [1962].)

44 Make no mistake, with the beach, the dunes, the park buffer, and the butterfly preserve, this case involves greater demands for property "dedications" than either *Nollan* or *Dolan*; here, the exaction was of everything Del Monte owned.

legislature had "a stupid staff" drafting its findings [505 U.S. at 1025, fn. 12]), but whether the underlying facts support the legislative result.[45] Remanding the case to give the State an opportunity to defend the legislative handiwork, this Court ". . . emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . . " (505 U.S. at 1031; internal punctuation simplified.)[46] Adverting to the government's financial interest in the results of the regulation, the Court also noted that when — as appears both here and in *Lucas* — regulations "requir[e] land to be left substantially in its natural state [they] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (505 U.S. at 1019.)

Thus, after *Lucas*, this Court's standard for reviewing intrusive legislative/regulatory land use action is several leagues away from the extremely deferential template wished for by the City and its *amici*. Their theory's foundation is

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[45] Recall that, in *Lucas*, the property owner conceded that the regulation was legitimate (120 L.Ed.2d at 808), but successfully argued that its impact was a taking nonetheless. In other words, taking for a "good" purpose is still a taking. Thus to say, as do the City and its *amici*, that government should be free of judicial review because of the environmental (or other) goodness of its purpose, is to utter a constitutional non sequitur. The purpose of the Fifth Amendment is ". . . to secure *compensation* in the event of otherwise *proper* interference amounting to a taking." (*First English*, 482 U.S. at 315; first emphasis, the Court's; second emphasis added.) After all, *every* condemnation is for a valid public use, but that only requires, not excuses, the payment of compensation. (*Mahon*, 260 U.S. at 415; *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 [Fed. Cir. 1994].)

[46] Contrary to what the American Planning Assn. may want to believe (APA, p. 11), this is hardly viewing regulations "with great deference."

hopelessly flawed because, under it, *a court could never determine that a municipal regulation offends the Constitution*. That determination would be the municipality's alone, which would thereby get to pass constitutional judgment on its own handiwork, raising serious due process concerns.

This Court applied its *Lucas* skepticism in *Dolan*, 512 U.S. 374, concluding that the city's findings failed to "show the required reasonable relationship" between the exaction demanded as a condition to a building permit request and the impact of the proposed development on the city. Far from deferring to the municipal say-so, the Court placed the burden on the city to justify its regulation, and to make a determination as to each property owner affected by a regulation that affected many properties. (512 U.S. at 391, fn. 8.) That is hardly consistent with the City's present demand that it should get to pass judgment on whether it has satisfied constitutional criteria lest it be "second-guessed" by the courts.

In light of the incessant argument by the City and its *amici* that the rules must be different for pure regulatory cases and physical exaction cases, it is noteworthy that the group of cases discussed above contains two of each. *First English* and *Lucas* were pure regulatory cases, while *Nollan* and *Dolan* involved exactions. This Court insisted that constitutional restraints and critical judicial analysis be applied in all of them alike. In fact, in *Lucas*, this Court remarked on "the practical equivalence in this setting of negative regulation and appropriation." (505 U.S. at 1019.) In other words, as Justice Brennan had noted years earlier, the impact of severe regulation is the same as physical invasion, and should be treated the same under the Constitution. (*San Diego Gas*, 450 U.S. at 652; dissenting, but expressing the substantive views of five Justices.) In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court said the *Nollan* standard that, according to the City, applies only to exactions, applies in regulatory taking cases to determine "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." (*Id.*

at 530.) Del Monte of course acknowledges that the burden of proof is different in the two classes of cases. The property owner bears the burden in the pure regulatory context (as Del Monte willingly shouldered below), while the government bears the burden in the physical context (as this Court held in *Dolan*). But exactions are involved here too, if that matters. In any event, no case holds that municipal regulatory actions are beyond judicial review. This Court long ago had the appropriate response:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; [and] that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . . Under our system of government, such a conclusion is obviously untenable. . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." (*Sterling v. Constantin*, 287 U.S. 378, 397-398 [1932].)

Against this background, it is impudent for the City to assert (as if it were invoking an existing rule in regulatory taking cases) that "courts employ deferential standards of review and require only that there be *some basis* to support the local government's decision." (City 39; emphasis added.) Thus, charges the City, "[t]he Ninth Circuit's decision fundamentally changes the traditionally deferential approach applied to local land use decisions." (City 39.) Wrong. There may be all the "basis" in the world for the City's action, but that neither justifies confiscation (*Lucas*,

505 U.S. at 1028-1029) nor prevents judicial review.[47] In fact, the Ninth Circuit provided exactly the kind of review this Court requires in *prima facie* cases of regulatory taking. As this Court put it in *Yee*, 503 U.S. at 522, a regulatory taking case "necessarily entails complex factual assessments of the purposes and economic effects of government actions." "Complex . . . assessments" are antithetical to the abject judicial surrender of Constitutional prerogatives sought by the City.

Under both *Lucas* and *Dolan* the proper standard for review subjects the governmental action to searching evaluation. That is why *Lucas* emphasized that the government must go beyond public interest platitudes or generalized assertions that the proposed private use is not compatible with the public interest. *Dolan* built on that by placing the burden on the government to justify the exaction of property in exchange for approval of a project. (505 U.S. at 1031.) But in any event, there must be compliance with the Constitution, and that decision is one for the judiciary — as has been the case ever since *Marbury v. Madison*, 1 Cr. 137 (1803).

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[47] The City's argument is thus misfocussed. A takings claim always presumes that the government has a legitimate "basis" for its action; otherwise the governmental act is *ultra vires* and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952].) The only issue is obtaining compensation when that action takes private property. (E.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed. Cir. 1994].)

III.
"PROPORTIONALITY" IS A FINE STANDARD. IT WASN'T USED AT THE TRIAL IN THIS CASE, AND IT WAS MERELY DICTUM ON APPEAL, BUT "PROPORTIONALITY" PERMEATES AMERICAN LAW

The City and some of its *amici* have become mesmerized by the concept of "proportionality," and see evil lurking there that exists only in their imaginations. Their arguments overlook these things: First, American law in general is based on proportionality. That's why we don't imprison jaywalkers. We let the punishment fit — or be proportional to — the offense.[48] Second, takings law in particular is permeated with proportionality. It wasn't something this Court had to invent for *Dolan*. Third, the concept wasn't placed before the jury anyway, and the Court of Appeals used it to shed light on the issue of reasonableness. To the extent it was more, it was dictum — and the dictum makes sense.

Taking the last item first, what the Court of Appeals said was "[e]ven if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest." (Pet. App. 16.) Simply put, if a homeowner installs a dining room lamp that violates a building code, she may properly be ordered to correct it — but we do not bulldoze her home to the ground. In like fashion, whatever harm may have been apprehended here by the City, it did not justify a ukase that the subject property be completely useless. Another court caught the essence of the issue: "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and

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[48] See also *United States v. Bajakajian*, 118 S.Ct. 2028, 2031 (1998) ("... full forfeiture of respondent's currency would be grossly disproportional to the gravity of the offense.")

not allocating to some number of individuals, less than all, a burden that should be borne by all?" (*Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 [Fed. Cir. 1994].) Thus, when the City finally forbade all use of Del Monte's land for the sake of a butterfly preserve in an area where there were no butterflies, the jury was entitled to consider whether that was reasonable in the context of what the City said it was trying to accomplish. Plainly, it was not. That's why the City doesn't like the standard.

Beyond that, there's nothing strange or unique about examining proportionality in the context of takings cases. In this Court's most recent decision, *Eastern Enterprises v. Apfel*, __ U.S. __, 118 S.Ct. 2131 (1998), a four-Justice plurality concluded that Congress took Eastern's property by creating a "disproportionate" scheme to allocate the cost of health benefits in the coal industry. (118 S.Ct. at 2149.) "[T]he Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern." (118 S.Ct. at 2153.) In earlier litigation similar to *Eastern*, this Court found no taking because the liability imposed was not "out of proportion." (*Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 [1993].)

In *Lucas*, this Court described the examination of the evidence to determine whether a regulatory taking had occurred as a "total taking" inquiry that would require:

> "... analysis of, among other things, the *degree of harm* to public lands and resources or adjacent private property, posed by the claimant's proposed activities, the *social value* of the claimant's activities and their *suitability to the locality* in question, and the *relative ease* with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike." (505 U.S. at 1030-1031; citations omitted; emphasis added.)

That's a proportionality analysis. It is a comparison of the proposed development with surrounding land uses and an evaluation of such intangibles as "social value" and "suitability." If, after that analysis, the trier of fact concludes that the harm caused by the proposed development is disproportionate (i.e., its burden outweighs its utility), then the regulation stands and no taking will be found.

The traditional *Agins* test is a double exercise in proportionality. The trier of fact is asked to determine whether the governmental action "substantially advances" a "legitimate state interest" and, if it does, whether it nonetheless denies the property owners "economically viable" (or, as the Court would say in *Lucas*, "economically beneficial or productive") use of their land. If the balances are out of proportion, then the party with the short end of the stick loses. (See *Keystone*, 480 U.S. at 499, for an illustration of a proportionality analysis of economically viable use.)

When only a part of a larger holding is adversely affected by the challenged regulation, then additional proportionality analyses are required. The trier of fact must first determine what the appropriate "unit of property" is, and then analyze the regulation's impact on that "parcel as a whole." When the analysis is complete, the court will have determined whether the regulation's impact is proportional to the property owner's holdings and, hence, whether a taking has occurred. (See *Lucas*, 505 U.S. at 1016, fn. 7.)

The three-factor test of *Penn Central*, 438 U.S. 104, is also an exercise in proportionality. A key ingredient is whether the action being reviewed unjustly imposes a burden on the owners that should "be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons." (438 U.S. at 124.) That built on an earlier proportionality decision that the Fifth Amendment was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the populace as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 [1960]) — like imposing the

disproportionate burden on one property owner to provide a butterfly preserve for the entire community. (See also *Agins*, 447 U.S. at 260; *First English*, 482 U.S. at 318-319.)[49] In sum, whether by regulation or exaction, the City cannot curtail uses of private property so disproportionately that no economically productive uses are left to the owner.

IV.
RESPONSE TO AN UNAUTHORIZED *AMICUS CURIAE* ISSUE: THERE IS NOTHING WRONG WITH THE *AGINS* FORMULA

The Solicitor General's *amicus* brief poses a question never addressed in this litigation: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation." (U.S., p. I.)

That "question" challenges the test established by this Court in *Agins*. But the City never challenged the *validity* of that test — at trial, on appeal, or in its Petition for Certiorari.

This Court has always read Rule 14.1(a), Rules of the Supreme Court of the United States, as strictly limiting the issues to those presented in the Petition for Certiorari. In *Yee*, 503 U.S. at 535-537, for example, this Court refused to consider arguments that a rent control ordinance was a *regulatory* taking because the question presented in the Petition inferentially limited itself to a *physical* taking. The Court agreed that the questions were "related" and "complementary" (503 U.S. at 537), but refused to consider them despite Petitioner's urging. More recently, in *Blessing v. Freestone*, 520 U.S. __, 137 L.Ed.2d 569 (1997), a § 1983

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[49] Even the City's brief recognizes that the core of takings law is to prevent regulatory burdens from being "disproportionately" placed on individual property owners. (City 25, 33.)

case challenging a state official's refusal to comply with federal AFDC requirements, this Court refused to consider two arguments raised by the Petitioner, even though they went to the heart of his liability. The first was whether to reconsider *Maine v. Thiboutot*, 448 U.S. 1 (1980) — just as the Court is now being asked to reconsider *Agins*. If that ploy had succeeded, § 1983 would no longer apply to statutory rights, and the Petitioner would have won. The second argument was whether the Eleventh Amendment precluded this suit against a state official. Again, success would have yielded victory for the Petitioner. This Court refused to consider either argument because they were neither raised nor decided below. (137 L.Ed.2d at 582, fn. 3; accord, *Suitum*, 137 L.Ed.2d at 990.) An *amicus* has even less standing than a party to inject extraneous issues. (E.g., *Knetsch v. United States*, 364 U.S. 361 [1960].)

Del Monte does not believe that question is properly here, and urges the Court to disregard it. Were it presented by any other entity, Del Monte would go no further and wait for the Court to order additional briefing on this additional issue, if it were desired. However, as the question has been posed by the Solicitor General, we will make a brief response on the merits, with the *caveat* that space limitations forbid analysis of an issue of this magnitude — the *Agins* test has been reiterated in eight decisions of this Court[50] — and scores of lower court opinions. It should not be decided on anything other than full briefing on a properly presented full record. (Compare *Yee*, 503 U.S. at 538; *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, fn. 3 [1990].)

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[50] *San Diego Gas*, 450 U.S. at 647 (Brennan, J., dissenting on behalf of four Justices); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan*, 483 U.S. at 834; *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring and dissenting); *Yee*, 503 U.S. at 534; *Lucas*, 505 U.S. at 1015-1016; *Dolan*, 512 U.S. at 385.

The strange governmental premise of this argument is that it is merely asking the Court to clear away a bothersome "dictum" that has never formed a holding of this Court. (U.S., pp. 9, 21.) That is a false premise.[51] In *Agins*, this Court laid down the rule for evaluating takings claims (447 U.S. at 260), and then it *applied* that rule *by holding* that the city had met the standard: "the zoning ordinances substantially advance legitimate governmental goals" (447 U.S. at 261). That was no dictum; it was a *ratio decidendi*. Thereafter, in *Nollan*, this Court again applied the standard and held that the California Coastal Commission had failed the test of advancing the public purpose, and therefore its regulation was invalid. (483 U.S. at 837.) In *Keystone*, this Court summarized the rule this way: "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . .' [Citing *Agins*.]" (480 U.S. at 485.) Thus, this Court has itself applied the "substantial advancement" rule, once to uphold a regulation and once to strike one down. It is not "mere" dictum. Undoing it would require disapproval of both *Agins* and *Nollan*.

At the heart of the substantive argument is the neo-*Lochner*ian idea that "failure to substantially advance a legitimate state interest" is "really" a substantive due process standard, rather than a takings standard. (See U.S., p. 29, fn. 16; League for Coastal Protection, *et al.*, p. 8.) But the *Agins* formulation fits with this Court's current views of the relationship of substantive due process to the enumerated protections in the Bill of Rights. In a nutshell, *Graham v. Connor*, 490 U.S. 386 (1989) holds that, where a claim can be brought under one of the separately stated guarantees in the Bill of Rights, there can be no claim for a violation of substantive

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[51] Moreover, as shown in the *amicus* brief of the National Assn. of Home Builders (pp. 16-17, fn. 5), the Solicitor General has never questioned either the validity or precedential authority of this rule in any of the briefs he has filed here since *Agins*. On the contrary, the Solicitor General has consistently accepted and sought to apply that rule to the United States' advantage.

due process. The Ninth Circuit has held that rule directly applicable to takings claims, concluding after *en banc* consideration that no claim that is arguably a takings claim can be litigated as a substantive due process violation. (*Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994] [*en banc*].) That rule has been repeatedly applied in the Ninth Circuit, and this Court has declined opportunities to review it. (*Macri v. King County*, 110 F.3d 1496 [9th Cir. 1997], *cert. denied*, 118 S.Ct. 1178; *Sinclair Oil Co. v. County of Santa Barbara*, 96 F.3d 401 [9th Cir. 1996], *cert. denied*, 118 S.Ct. 1386.)

Thus it is the law, at least west of the Rockies, that property owners have no substantive due process claims, and *all* their claims are subsumed within the takings theory. As *Sinclair* summarized it, "in recent days we have expressly refuted the notion that substantive due process claims can apply where the government has allegedly effected a taking violative of the Fifth Amendment. In *Armendariz*, we explained that substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit. *Sinclair's* substantive due process claim, therefore, no longer states a valid cause of action." (96 F.3d at 407; internal punctuation simplified.)

Thus, the substantive due process argument proves too much: the reality is that all claims by property owners are now viewed judicially as takings claims and must be litigated that way. The first prong of the *Agins* test accurately states current law.

Apart from the absence of a substantive due process remedy for property owners, the Solicitor General also errs by refusing to acknowledge that this is a § 1983 case. That is the only explanation for the argument that government action that *fails* the substantial advancement test cannot be a taking, because all takings must serve legitimate public purposes. (U.S., pp. 26-27.) But a § 1983 action is brought

because of a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." (*Monroe*, 365 U.S. at 184; quoting with approval.) Here, the City had the power and the duty to acquire this land, but it *refused* to exercise the eminent domain power. Had it done its duty, it would have directly condemned Del Monte's property. Doing so would plainly have been for a public purpose and would have substantially advanced a legitimate state interest *and* it would have compensated Del Monte. When the City chose instead to subvert constitutional strictures, it established the basis for this statutory suit.

The *Agins* rule remains good law. There is no reason to tamper with it.

CONCLUSION

The Ninth Circuit got this one right. Its judgment merits affirmance. This is one of the few regulatory taking cases that has managed to survive the ripeness gauntlet, go to trial on the merits, and result in compensation for a severely damaged property owner. An owner who goes through five different administrative proceedings, being strung along by an agency that never wanted this property developed to begin with, and is then turned down for reasons that preclude any private development, deserves compensation. If this Court nullifies the positive result of a judicial struggle dating back to 1986 (with administrative proceedings that began in 1981), the message will not be lost on other regulators. A decision in the City's favor will nullify all the good done by this Court's decisions in *First English*, *Nollan*, *Lucas*, *Dolan*, and *Suitum*. If this Court really meant what it said in *Dolan*, it will affirm:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a

poor relation . . . ." (512 U.S. at __, 129 L.Ed.2d at 321.)

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